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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

JUL 03 2003

FILE: [redacted] OFFICE: CALIFORNIA SERVICE CENTER DATE:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center initially approved the employment-based preference visa petition. Subsequently, the beneficiary applied for adjustment of status. Based upon an investigation conducted by a Bureau official in Beijing, China at the request of the district director, the director concluded that an error was made in approving the petition. The director, therefore, properly served the petitioner with a Notice of Intent to Revoke, and he ultimately revoked the petition's approval on November 20, 2002. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a California corporation that seeks to employ the beneficiary as its general manager. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director revoked his approval of the petition on the grounds that: (1) the proffered position is not in an executive or managerial capacity; and (2) no qualifying relationship exists between the petitioner and the claimed foreign entity.

On appeal, counsel submits a brief. Counsel states, in part, that the director ignored additional evidence that the petitioner had submitted in response to the Notice of Intent to Revoke.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

> (1) Priority Workers. - - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. - - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is

required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

Bureau regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding the Bureau's burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The first issue to be discussed is whether a qualifying relationship between the petitioner and the foreign entity continues to exist at the present time.

Pursuant to 8 C.F.R. § 204.5(j)(2), a subsidiary is defined, in part, as a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity. At the time of filing the I-140 petition with the California Service Center in 1996, the petitioner averred that it was a wholly owned subsidiary of Shanghai Qunjun Industry Co., Ltd. of the People's Republic of China (China). As evidence supporting this relationship, the petitioner submitted copies of its tax returns, a copy of one stock certificate, and a copy of its corporate stock ledger.

On August 16, 2002, the director issued to the petitioner a Notice of Intent to Revoke. In this notice, the director informed the petitioner that, based upon information supplied by the beneficiary during his adjustment of status interview, the district director requested an investigation of the foreign entity by a Bureau official in Beijing, China. According to the director:

> [O]n December 21, 1999, [a Bureau] investigator from the American Embassy - Beijing, conducted a field investigation at the claimed parent company, Shanghai

> Qunjun [I]ndustry Company (SHQJ). The address visited was that submitted to this [Bureau] by [the] applicant. [Bureau] investigators found the offices (rooms) empty. The Department of Leasement Affairs was then contacted[,] where it was discovered that the claimed parent company (SHQJ) had vacated the office space held two years earlier. Additional, [sic] both telephone numbers provided by [the] applicant met with negative results; 021-65242943 went unanswered after numerous attempts over several days; 021-65210066 was unanswered and it was discovered that the company name was Orient Int'l Industry Group, Inc. This telephone number never belonged to (SHQJ) nor had they ever heard of a person called Jun Zhu.

Based upon this information, the director concluded that, as the foreign entity was no longer a viable company, a qualifying relationship between the U.S. and foreign entities did not exist at the time of the beneficiary's adjustment of status. The director provided the petitioner 30 days to offer any evidence in rebuttal.

In response, counsel stated that, in 1998, the foreign entity, SHQJ, merged with Shanghai Flag Holder Trading Investment Ltd. (SFHT) of China. He further declared that in April 1999, SFHT sold its import/export division to Shanghai SMEC Development Ltd. (SSMEC) of China, at which time SSMEC became the petitioner's parent company. According to counsel, when the initial merger occurred in 1998, SHQJ moved its operations, and for this reason, the investigator found an empty office at the foreign entity's former address. Counsel stated that the petitioner would be submitting documentary evidence to show the relationship between the U.S. and foreign entities.

The director did not receive the documentary evidence to which counsel referred. Therefore, on November 20, 2002, the director revoked his approval of the petition, stating that the petitioner failed to submit sufficient evidence in rebuttal to the proposed grounds for revocation.

On appeal, counsel states that the director did not consider evidence that the petitioner had submitted in response to the Notice of Intent to Revoke. Counsel reiterates the change of ownership of the foreign entity that he outlined in response to the director's notice. Counsel also states that the beneficiary denies having provided the second telephone number that was listed in the investigation report. In support of counsel's statement that the petitioner's new parent company is SSMEC, the petitioner submits: an October 29, 2002 letter from the beneficiary that discusses the U.S. entity's ownership; a letter regarding SHQJ'S dissolution as a result of its merger with SFHT; a letter regarding the sale of SFHT; a letter from an attorney in

China regarding the petitioner's ownership; business licenses of SFHT and SMMEC; two asset transfer agreements; deregistration certificates for SHQJ; and a copy of its 2001 corporate income tax return (Form 1120).

The evidence submitted on appeal fails to clarify the petitioner's ownership. As previously stated, the petitioner maintains that it has been a wholly owned subsidiary of SSMEC since April 1999. According to the petitioner, SSMEC bought the petitioner from SFHT, which had merged with the petitioner's original parent, SHQJ, in 1998.

On its 2001 corporate income tax return (Form 1120), however, the petitioner states that it is wholly owned by SFHT, not SSMEC. Additionally, the asset transfer agreement between SFHT and SSMEC, in which SFHT allegedly sells the petitioner to SSMEC, is neither signed nor dated. Neither of these documents is credible evidence that the petitioner continues to have a qualifying relationship with a foreign entity.

The petitioner has not resolved the inconsistent information in the asset transfer agreement and the 2001 tax returns by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not contain copies of stock certificates to show that SSMEC acquired the petitioner's shares of stock, or a copy of the petitioner's corporate stock ledger to verify its current ownership. Based upon the evidence before the Bureau at the present time, the petitioner no longer has a relationship with a qualifying entity. 8 C.F.R. § 204.5(j)(3)(i)(C). The director's revocation of the petition's approval on this basis, therefore, will not be disturbed.

The second and final issue to be discussed in this proceeding is whether the proffered position of general manager is in an executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

At the time of filing the petition in 1996, the petitioner averred that it: (1) was engaged in the import and export of hardware, electronic equipment, and auto accessories; and (2) employed five persons, including the beneficiary. According to an accompanying organizational chart, the staff consisted of one general manager (beneficiary), one import/export manager, one administrator/ accounting manager, and two assistants. The petitioner submitted a copy of one DE-6 form, which showed that it employed five individuals.

The petitioner did not submit job descriptions for any employee but the beneficiary. The beneficiary's job was described as:

> Manage, direct[,] and control entire operation of company, including development and promotion of

company's business operations; promote efficient operations and handling of new markets and improve company's competitive position in the industry; oversee and control the overall company policies concerning marketing/sales/shipping between U.S.A. and foreign nations and for export to China and import from China; direct conduct of consumer research for new product marketing and for sales potential of popular product lines and proposed product lines; set up and oversee budgetary policies of company. Serve as representative of company to parent company; top responsible officer for liaison with governmental authorities between countries.

In the Notice of Intent to Revoke, the director noted that, according to its 1995 corporate income tax returns, the petitioner paid the beneficiary $30,000 as compensation to an officer and only $18,550 in salaries and wages to four employees. The director deduced from this information that the petitioner did not employ a full-time staff that could relieve the beneficiary from performing administrative work. Therefore, the director concluded that the proffered position was not in a managerial or executive capacity. The director provided the petitioner 30 days to offer evidence in rebuttal.

In response, counsel stated that the beneficiary supervised one professional, Mr. [redacted] who holds a baccalaureate degree in computer and information science and a master's degree in education. Counsel stated that the petitioner would be submitting evidence to show that the beneficiary functions in a managerial capacity because he supervises and controls the work of a professional, is the highest-ranking officer of the company, reports only to the board of directors, and exercises discretion over the day-to-day operations.

The director did not receive the documentary evidence to which counsel referred. Therefore, on November 20, 2002, the director revoked his approval of the petition, stating that the petitioner failed to submit sufficient evidence in rebuttal to the proposed grounds for revocation.

On appeal, counsel states that the petitioner submitted a copy of Mr. [redacted] baccalaureate and master's degrees to show that the beneficiary supervises one professional employee. Counsel also submits copies of Form DE-6 for the previous four quarters to show that the petitioner employs both the beneficiary and Mr. [redacted] Counsel reiterates the beneficiary's job responsibilities and further states that the beneficiary has the authority to establish goals and policies. Counsel also asserts that the petitioner has submitted evidence to show that, in addition to its export and import business, the petitioner provides market research and business development information. According to counsel, the

beneficiary works in a managerial or executive capacity because Mr. [redacted] performs the tasks necessary to provide market research and business development advice, so the beneficiary can devote his time to managerial or executive duties. In support of counsel's assertions, the petitioner submits an October 29, 2002 letter from the beneficiary, in which he describes his duties and the business in which the petitioner is engaged.

A review of the evidence in the record reveals that, neither at the time of filing the petition nor at the present time, could the proffered position considered to be in a managerial or executive capacity.

At the time of filing the petition, the petitioner claimed to employ five persons; however, it did not describe the job duties of any individual but the beneficiary. The petitioner failed to explain and document who performed the day-to-day tasks, such as buying and shipping, which were associated with its import/export business. Accordingly, the petitioner failed to show that, at the time of filing the petition, the beneficiary would manage or direct the provision of its services rather than perform the tasks necessary for the petitioner to provide its services in the import/export arena. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). The beneficiary's job description, which contained broad job duties, was insufficient to demonstrate that the beneficiary would primarily execute managerial or executive duties.

Similarly, the petitioner's description of its current staffing levels and organizational structure also fails to establish that the beneficiary would perform the high level responsibilities listed in the definition of managerial or executive capacity.

The petitioner claims that it employs the beneficiary in the proffered position and one assistant manager. Counsel asserts that the assistant manager is a professional employee because he holds baccalaureate and master's degrees. However, when determining whether a position is professional, the Bureau looks at whether the position requires the attainment of a baccalaureate or higher degree, not the qualifications of the individual occupying the position. As the petitioner failed to provide a comprehensive description of the assistant manager's position, the Bureau is unable to determine whether the assistant manager works in a professional, supervisory or managerial capacity. The evidence in the record at the present time illustrates that the beneficiary is a first-line supervisor only. 8 C.F.R. § 204.5(j)(4)(i).

Counsel also asserts that the beneficiary's role with the petitioner is in a managerial or executive capacity because the petitioner is now involved in market research and business development. Neither counsel nor the petitioner, however, submits any documentary evidence that the petitioner has

fundamentally changed its business operations. Furthermore, the petitioner has not submitted a job description for the beneficiary that clearly describes the new duties that the beneficiary would perform. 8 C.F.R. § 204.5(j)(5). Without supporting documentary evidence, the petitioner has not met its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

There is "good and sufficient cause" within the meaning of section 205 of the Act to revoke the approval of a visa petition if the evidence of record at the time of the decision warrants a denial based on the petitioner's failure to meet his or her burden of proof. *Matter of Estime, supra*. Based upon the above discussion, the petitioner has not demonstrated that: (1) at the time of filing the petition or at the present time, the position offered to the beneficiary is in an executive or managerial capacity; and (2) it is a subsidiary of a qualifying foreign entity. Therefore, the director's decision to revoke approval of the petition shall not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The director's November 20, 2002 decision to revoke the approval of the petition is affirmed.